



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date:	05/14/12	Bill No:	Assembly Bill 2441
Tax Program:	Sexually Oriented Business	Author:	Williams, et al
Sponsor:	CALCASA	Code Sections:	RTC Part 14.7 (commencing with Section 34001)
Related Bills:		Effective Date:	01/01/13

This analysis only addresses the provisions that impact the BOE.

BILL SUMMARY

This bill imposes upon all persons who operate a sexually oriented business (SOB), as defined, a tax at the rate of ten dollars (\$10) per visit by a customer to the business inclusive of admission and reentry to be administered by the Board of Equalization (BOE).

Summary of Amendments

Since the previous analysis, this bill was amended to, among other things, specify the taxpayer to be a person operating a SOB, add a delayed operative date, and revise the definition of “nude” and “sexually oriented business.”

ANALYSIS

CURRENT LAW

Under existing law, California does not impose a tax or surcharge on general admissions. However, various local communities impose an admissions tax. For example, the City of Santa Cruz imposes a 5-percent admissions tax; the City of San Mateo levies a 50-cent tax on admissions to horse or harness racing events; and the City of Fairfield levies an admission tax of five dollars (\$5) for the privilege of playing golf.

At the state level, the State Athletic Commission levies a fee on admissions to boxing contests or wrestling exhibitions. The law requires the promoter or other organization conducting the boxing, kickboxing, martial arts, or wrestling contest to pay the commission a fee of 5% of the amount actually paid for admission to a contest, except that the fee may never be less than \$1,000 for a professional contest and \$500 for an amateur contest.

PROPOSED LAW

This bill would add Part 14.7 (commencing with Section 34001) to Division 2 of the Revenue and Taxation Code to impose, for the privilege of operating a SOB, a tax upon all persons who operate a SOB at the rate of ten dollars (\$10) per visit by a customer to the business inclusive of admission and reentry.

A person who operates a SOB would be required to record daily the number of customers admitted to the business, maintain those records for the period required by the BOE, and make the records available for inspection and audit.

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Administration. The BOE would administer and collect the tax pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001)). For purposes of the SOB Tax, the references in the Fee Collection Procedures Law to “fee” would include the tax imposed by this bill and references to “feepayer” would include a person required to pay that tax.

The Fee Collection Procedures Law contains “generic” administrative provisions for the administration and collection of fee programs to be administered by the BOE. It was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund, and appeals provisions, and it provides the BOE the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

The BOE would be authorized to prescribe, adopt, and enforce regulations relating to the administration and enforcement of the SOB Tax.

Registration, Reporting, and Payment. Every person required to pay the SOB tax would be required to electronically register with the BOE using an application prescribed by the BOE, as described.

The taxes imposed would be due and payable to the BOE on or before the last day of the month following each calendar quarter. In addition, a return for the preceding quarterly period would be required to be filed with the BOE using electronic media. The return would be due on or before the last day of the month following each calendar quarter.

The electronic application for an account and returns would be authenticated in a form or pursuant to a method as may be prescribed by the BOE.

The BOE would transmit all payments, less refunds and the BOE’s costs of administration, to the Treasurer to be deposited in the State Treasury to the credit of the Sexual Assault Treatment and Prevention Fund (Fund), which this bill creates. Moneys in that fund would, upon appropriation by the Legislature, be used as specified in Health and Safety Code Section 26300, which this bill would add as Chapter 20 (commencing with Section 26300) of Division 20. Section 26300 provides that the funds be used for the following:

- To award grants for: intervention services related to sexual assault survivors and rape prevention programs provided by rape crisis centers; reimbursement for sexual assault forensic exams; programs for the intervention and prevention of sexual violence, outreach programs, training, and technical assistance to and support of California rape crisis centers; and support of intervention and treatment services for victims of sexual exploitation of human trafficking and sexual assault as part of dating or domestic violence.
- Administration by the California Emergency Management Agency (Agency) of the grant programs.
- To fund a specified report created by the Agency to the Governor and the Legislature.

Definitions. The bill defines the terms:

- “Nude” to mean clothed in a manner that leaves uncovered or visible through less than fully opaque clothing, any portion of the genitals or, in the case of a female, any portion of the breasts below the top of the areola of the breasts.
- “Sexually oriented business” to mean a nightclub, bar, restaurant, or similar commercial enterprise that does both of the following.
 - Provides for an audience of two or more individuals live nude entertainment or live nude performances where the nudity is a function of everyday business operations and where nudity is a planned and intentional part of the entertainment or performance.
 - Authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic beverage Control Act.

Miscellaneous. The bill provides that a person who operates a SOB may not require the tax to be reimbursed by an employee or independent contractor of the SOB, but may require the tax to be reimbursed by the customer upon whose entry the tax is imposed upon, in a manner prescribed by the BOE.

The bill would become operative on the first day of the first calendar quarter commencing more than 90 days after the effective date of the act.

BACKGROUND

Recent measures have proposed similar taxes.

AB 847 (Salas, 2009) would have imposed a 20-percent tax on the gross receipts, as specified, of an adult entertainment venue, as defined, in this state. The revenues derived from the tax would be transferred to a newly created Adult Entertainment Impact Fund. This bill failed passage in the Assembly Revenue and Taxation Committee.

AB 2914 (Calderon, 2008) would have imposed 1) a 25-percent tax on the gross receipts of an adult entertainment venue, as defined, and 2) an 8-percent tax on the sale or purchase of tangible personal property that is adult material, as defined, including digitally transmitted adult material, and the qualified gross receipts of a qualified business, as defined, where the business has more than 50 percent of its gross receipts derived from the production, distribution, or sales of adult entertainment movies. This bill was held on the suspense file in the Assembly Appropriations Committee.

AB 1551 (Calderon, 2007) would have imposed an 8-percent tax on the gross receipts of an adult entertainment venue, as defined, and on the total gross charges of a pay-per-view adult entertainment movie. This bill was never heard in a committee.

COMMENTS

1. **Sponsor and Purpose.** This bill is sponsored by the California Coalition Against Sexually Assault (CALCASA) and is intended to establish a revenue stream to help fund sexual assault awareness, outreach, training and technical assistance, intervention and prevention, programs that support victim advocacy, and forensic exam rape kit processing.
2. **Amendments.** The **May 14, 2012 amendments** revise the definition of “nude,” modify the definition of “sexually oriented business” to include only those businesses

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where nudity is a function of everyday business and a planned and intentional part of the entertainment or performance, and clarify the imposition of tax with respect to a customer that reenters a SOB on the same visit. The **April 19, 2012 amendments** specified the taxpayer to be a person operating a sexually oriented business, added a delayed operative date, removed redundant language, required electronic filing and registration, revised the definition of “nude,” and provided that a person who operates a SOB may not require the tax to be reimbursed by an employee or independent contractor of the business. The **April 9, 2012 amendments** revised the definition of “nude” to delete the reference to “entirely unclothed” and clarified that a SOB may not require the tax imposed by this measure to be reimbursed by an independent contractor of that business. Other amendments, which don’t affect the BOE, related to how revenues deposited into the Fund may be used.

- 3. What is a sexually oriented business?** This bill defines the category of business which would be subject to the tax to be a nightclub, bar, restaurant, or similar commercial enterprise that provides for an audience of two or more individuals live nude entertainment or live nude performances and authorizes on-premises **consumption** of alcoholic beverages, regardless of whether the consumption of such beverages is under a license issued under the Alcoholic Beverage Control Act.

Accordingly, clubs providing nude entertainment, as defined, that elect not be licensed, or are prohibited from licensing under local ordinances, would be subject to the tax proposed by this measure if they permit customers to **consume** alcoholic beverages on their premises. However, the Alcoholic Beverage Control (ABC) Act prohibits the consumption of any alcoholic beverage at premises not licensed under the Act (Business and Professions Code (B&PC) Section 25604). It would be difficult, if not impossible, for the BOE to identify and register such businesses as a taxpayer since they are operating in violation of the ABC Act. To address this concern, it is suggested amending the bill to require the Department of Alcoholic Beverage Control to notify the BOE of any person found in violation of B&PC Section 25604 and provide information regarding that person, as necessary, for the BOE to properly register and collect the tax.

Not included within the definition of SOB would be a business that has unplanned nudity or hosts an occasional wet t-shirt contest if nudity is not a function of everyday business operations and the nudity is not a planned and intentional part of the entertainment or performance. Also, a SOB would not include a business providing full nude entertainment¹ - even if the business permits the consumption of alcoholic beverages on their premises.

- 4. Further delayed operative date necessary.** To effectively implement this bill, it would be necessary for the BOE to notify and register SOBs, develop computer programs, hire and train key staff, create necessary forms and schedules, and answer taxpayer inquiries. These functions should take place before the tax becomes operative.

This measure currently includes a delayed operative date of the first day of the first calendar quarter commencing more than 90 days after the effective date of the bill. However, BOE staff estimates that it would take a minimum of six months to implement the new program proposed by this bill. In order to provide the BOE with

¹ Clubs providing full nude entertainment are prohibited from licensing under the ABC Act pursuant to Rule 143.2, which provides, in part, that “live entertainment is permitted on any licensed premises, except that no license shall permit any person to perform acts of...displaying the pubic hair, anus, vulva or genitals.”

the necessary six-month lead time, it is suggested that the bill be amended to provide for a delayed operative date to the first day of the first calendar quarter commencing more than 180 days (rather than 90 days) after the bill is enacted.

- 5. How would the BOE be funded for administrative start-up costs?** This bill proposes a tax to be imposed on the first day of the first calendar quarter commencing more than 90 days after the bill is enacted. In order to notify and register taxpayers, develop computer programs and reporting forms, and hire appropriate staff, an adequate appropriation would be required to cover the BOE's administrative costs that would not already be identified in the BOE's 2012-13 budget.

Typically, the BOE would seek payment from the Fund for administrative start-up costs through the budget change proposal (BCP) process. However, the Fund would not have a balance to reimburse the BOE's administrative start-up costs prior to the collection of the tax. To address this funding issue, this bill should be amended to add language authorizing a loan from the General Fund, or other eligible fund, to the Fund, to be repaid from taxes collected.

Constitutional and statutory provisions prohibit the BOE from using special fund appropriations to support the administration of the SOB tax program. Without an appropriation for administrative start-up costs, the BOE would have to divert General Fund dollars to the proposed tax program, which would have a negative impact on the revenues of State and local government.

- 6. Suggested amendments.** The bill prohibits reimbursement of the proposed tax by an employee or independent contractor of the SOB. It appears the BOE, a tax administration agency, would be required to investigate and determine whether or not a person who operates a SOB requires reimbursement from an employee or independent contractor. Perhaps the EDD is the agency best charged with making a determination under this provision. It is also suggested including a penalty to be imposed upon any person operating a SOB that violates this provision.

Furthermore, the bill authorizes the person who operates a SOB to be reimbursed for the tax by the customer whose entry the tax is imposed upon, in a manner prescribed by the BOE. This provision is unnecessary since the SOB can simply pass on the tax to the customer in the form of an increased admission or cover charge. The language should be removed.

- 7. First amendment issues.** In 2007, the Texas Legislature enacted a statute that imposed a tax on sexually oriented businesses in the amount of \$5 for each customer entry. A sexually oriented business was defined by the statute as a nightclub, bar, or similar enterprise that provided live nude entertainment and authorized consumption of alcoholic beverages. Karpod, Inc., a sexually oriented business located in Texas, and Texas Entertainment Association, Inc., which represented sexually oriented business interests, sued the Texas Comptroller of Public Accounts for declaratory and injunctive relief. The trial court concluded the statute violated the First Amendment to the U.S. Constitution, and the Texas Court of Appeals, Third District, affirmed the trial court's decision. (*Combs v. Texas Entertainment Assn., Inc.* (2009) 287 S.W.3d 852.)

The Controller again appealed, and, on August 26, 2011, the Texas Supreme Court, in *Combs v. Texas Entertainment Assn., Inc.* (347 S.W.3d 277), reversed the appeals court decision and determined that this tax, a tax very similar to the tax imposed by this bill, was constitutional and did not violate the First Amendment.

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Relying on several recent United States Supreme Court opinions (including one out of California – *City of Los Angeles v. Alameda Books, Inc.* (2002) 535 U.S. 425), the Texas Supreme Court concluded that the tax was clearly directed, not at expression in nude dancing, but at the secondary effects of nude dancing when alcohol is being consumed and, further, that a business could avoid the tax altogether by not allowing alcohol to be consumed. Finding that the tax met all four factors of what is known as the *O'Brien* test (*United States v. O'Brien* (1968) 391 U.S. 367, 377), including that the tax was no greater a restriction than was essential to the furtherance of the state's interest, the Texas Supreme Court upheld the statute and the tax and held that it did not violate the right to freedom of speech (i.e., expression in nude dancing).

On January 23, 2012, the United States Supreme Court rejected the SOB's petition seeking review of the case. (*Texas Entertainment Assn. v. Combs* (2012) 132 S.Ct. 1145.)

COST ESTIMATE

The BOE would incur substantial costs to administer this bill. These costs would be attributable to, among other things, identifying and notifying taxpayers, developing regulations, revising manuals and publications, creating a new tax return, computer programming, training staff, and answering numerous inquiries from the public.

This bill provides that a portion of the revenues generated from the new tax would pay for the BOE's costs of administration. A detailed cost estimate is pending.

REVENUE ESTIMATE

The revenue estimate for this bill is subject to considerable uncertainty. Our research indicates that there is a paucity of published information that would describe and provide a background about the SOB industry in California. Simply stated, this bill would impose a per-person admissions tax on specified SOBs, and we are not aware of any attendance figures that could be used to develop a reliable revenue estimate.

Approximately 180 sexually oriented businesses currently operate in California, roughly 80 of which serve alcohol and thus would be required to collect the tax under the bill's provisions. To establish an order of magnitude, if we conservatively assume that the average daily attendance statewide is 120 persons, this measure would generate \$35 million in revenue (365 days multiplied by 80 businesses multiplied by 120 persons per day multiplied by the \$10 tax rate). However, actual revenues could be significantly different (higher or lower), to the extent that actual attendance differs from the daily average we have assumed. Additionally, standard microeconomic theory suggests that attendance would decline somewhat in response to the imposition of the tax; however, the extent of the decline is unknown.

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